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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY GREEN,

Defendant and Appellant.

B164306

(Los Angeles County Super. Ct.
No. NA053180)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Arthur Jean, Jr., Judge. Affirmed.

Jeffrey A. Needelman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jeffrey Green appeals from a judgment after a jury trial in which he was convicted of second degree robbery (Pen. Code, § 211). He received a probationary sentence. His sole contention on appeal is that the trial court misinstructed the jury as to the lesser included offense of petty theft and the verdict forms. We affirm.

At approximately 11:00 a.m. on July 21, 2002, defendant entered Lendon liquor store in San Pedro. The store is owned and operated by Song Kim. Defendant stole socks and underwear and fled. Kim pursued defendant. When Kim approached defendant, she grabbed the merchandise and demanded its return. Defendant held onto the merchandise and swung his fist at Kim. In fear of being hit, Kim desisted her attempt to recover the merchandise. Defendant walked away with the stolen property.

The trial court instructed the jury as to the elements of robbery. The trial court then instructed the jury as to the lesser included offense of petty theft: “If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of robbery, you may nevertheless convict him of a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] The crime of petty theft is lesser to that of the crime of robbery. [¶] Thus you are to determine whether the defendant is guilty or not guilty of the crime charged or of the lesser crime. . . . [¶] However, please remember that the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime.”¹

The trial court then instructed the jury on the elements of petty theft. Thereafter, the trial court instructed: “Let me ad-lib here a moment. You are going to have three separate verdict forms. You are going to have a form with which you may find the defendant guilty of . . . robbery. You are going to have a form with which you may find the defendant guilty of petty theft. You will have a form that says not guilty. The not guilty form applies to both the robbery charge and the lesser included charge of petty theft. [¶] So if you sign that form, you are implying, although it just says robbery on it,

¹ Conflicting evidence in the record supported the trial court’s decision to instruct on the lesser included offense.

you are implying a not guilty finding with respect to the petty theft. Keep that in mind. You may only sign one of the three forms that's going to be submitted to you. [¶] If you have any question about that housekeeping instruction, don't hesitate, please ask."

In argument, the prosecutor told the jury: if you find defendant did not steal the merchandise, he is not guilty of anything; if you find defendant stole the merchandise, but did not use force or fear to keep it from Kim, he is guilty of petty theft; and if you find the defendant stole the merchandise and used force or fear to keep it from Kim, he is guilty of robbery.

The jury was given the three verdict forms described by the trial court. The attorneys had no objection to the instructions or the verdict forms. The jury deliberated for 45 minutes and had no questions concerning the instructions or the verdict forms. The jury found defendant guilty of robbery and the foreperson signed the guilty verdict form for robbery. The other two verdict forms were left unsigned.

Defendant contends the trial court's instructions were erroneous, because they told the jurors that if they found defendant not guilty of robbery, they must also find defendant not guilty of petty theft. From this premise defendant argues that the jury found defendant guilty of robbery, because they believed that, if they found defendant not guilty of robbery, they could not find defendant guilty of petty theft. From this premise defendant argues further that the jury was actually not given a choice of a lesser included offense, but an all-or-nothing choice of guilty of robbery or guilty of no crime. We conclude the instructions were not facially erroneous and defendant's interpretation of the trial court's instructions is unreasonable and there is no likelihood that they jury so construed the instructions.

The trial court told the jurors they had three choices: guilty of robbery; guilty of petty theft; and not guilty of any offense. The trial court further instructed the jurors they would be given three verdict forms reflecting their three choices. The use of these verdict forms was proper. (*People v. Cisneros* (1973) 34 Cal.App.3d 399, 428-430; *People v. Heffington* (1973) 32 Cal.App.3d 1, 14.) The trial court instructed the jurors that if they *signed* the not guilty verdict form, it meant they found defendant not guilty of

robbery and not guilty of petty theft. Thus, if the jurors found defendant not guilty of either offense, they had to sign only one form.

The jury was fully instructed on the elements of robbery and the elements of petty theft. The instructions made clear that the main difference between the two crimes was the element of force or fear. The jurors were instructed that if they had a reasonable doubt as to whether defendant had used force or fear to steal the merchandise, they should find defendant guilty of only petty theft. The jurors were instructed that they could not find defendant guilty of petty theft unless they unanimously found him not guilty of robbery. The clear meaning of the instructions was reiterated by the prosecutor in argument. The jury had no questions and arrived at a verdict in 45 minutes. The jurors were not confused. (Cf. *People v. Schindler* (1972) 23 Cal.App.3d 369, 377-378.)

Defendant's construction of the instructions would have required the jury to ignore the instructions on the lesser included offense, ignore the instructions on the elements of petty theft, ignore the argument of the prosecutor, and ignore the petty theft guilty verdict form. We find no error. (See *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519-520; Use Note to CALJIC No. 17.49 (7th ed. 2003) p. 504.) It is not reasonably likely that the jury misunderstood the applicable law. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.) We "must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.)

DISPOSITION

The judgment is affirmed.

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GRIGNON, Acting P. J.

We concur:

ARMSTRONG, J.

MOSK, J.